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No. 88-447

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

RODNEY G. VEST,

Petitioner,

vs.

MARIAN SCHAFER and STATE OF ALASKA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALASKA

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Is a state a "person" subject to suit for damages under 42 U.S.C. § 1983?

II. Should the rationale of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), be extended to create a cause of action for damages against a state for the enactment and execution of a state law that is subsequently declared void under the Fourteenth Amendment to the United States Constitution?

III. Is the Alaska Supreme Court correct that a state official is not subject to suit for damages in her personal capacity, where she merely executed a state law before it was declared unconstitutional by a court, and where she had not engaged in any wrongful individual action?

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OPINIONS BELOW

The Alaska Supreme Court opinion which is the subject of the instant petition for writ of certiorari has been published in the official reporter as Vest v. Schafer, 757 P.2d 588 (Alaska 1988). An excerpt of the superior court decision below is reproduced in Appendix C herein.

STATEMENT OF THE CASE

In 1972 the Alaska Legislature enacted a bill known as the Longevity Bonus Act. Section 1, ch. 205, SLA 1972; codified at AS 47.45.010 -- 47.45.170; see App. B. The Act created a program of monthly stipends to pioneer Alaskans over the age of 65, who were domiciled in the state at statehood and had been residents for at least 25 years. AS 47.45.010; App. B1. The stated purpose of the Act was to provide an incentive to qualifying individuals to "continue uninterrupted residency in the state." AS 47.45.170; App. B6-7. The legislature recognized these individuals as the pioneers who "through their tenacity and perseverance molded Alaska as we know it," and who had been treated by the federal government in effect as "second-class citizens" before

statehood. Id. Acknowledging that many of these pioneers were forced to spend their retirement years away from Alaska, the legislature expressed its hope that a monthly stipend would provide the economic means for many to remain in the state and share their wisdom and experience with new generations of Alaskans. Id.

The Longevity Bonus Program was explicitly not created as an entitlement program based on need. "Under no circumstances shall this chapter be considered a form, type, or manner, of public relief. Bonuses made under this chapter are not predicated on need even though they may appear to provide supplemental income to some qualified persons who would otherwise be forced to become responsibilities of the state." Id.

At the time the legislature passed the Longevity Bonus Act, the question of

its constitutional validity was unsettled. Although petitioner references information on this point that is not before this Court, 1/ it should suffice to say that at no time prior to the filing of the instant suit did the attorney general issue a formal opinion that the law was in fact unconstitutional. The law went unchallenged for ten years. Absent a judicial declaration that the Longevity Bonus Act was constitutionally invalid, the program was carried out. 2/

1/ The factual evidence regarding the state's constitutional analysis of the Longevity Bonus Program is not material to the instant petition for certiorari. The issue presented herein is whether a cause of action for damages exists.

2/ See App. C1-C4, wherein the superior court concluded that the law's unconstitutionality was not "clearly established" until the court so ruled in the instant case.

Three weeks after this Court decided Zobel v. Williams, 457 U.S. 55 (1982), petitioner brought suit against the administrator of the Longevity Bonus Program, Marian Schafer, and the State of Alaska. See Schafer v. Vest, 680 P.2d 1169 (Alaska 1984). As representative of a class of persons 65 years of age or older who were not recipients of longevity bonuses, petitioner sought three things: 1) a judicial declaration that the program was unconstitutional; 2) judicial severance of the offensive provisions of the statutory scheme, allowing the class to be included in the program prospectively; and 3) retroactive benefits or damages for the period of time the class was excluded from the program.

The superior court granted petitioner summary judgment on the constitutional issue. Id. at 1170. However, in

light of the fact that the legislature had enacted an express non-severability provision (§ 3, ch. 205, SLA 1972; App. B7), the court denied petitioner the relief requested in that regard. The Alaska Supreme Court affirmed the constitutional holding; the non-severability issue was not appealed. Id.

Petitioner then moved for damages against the state and Ms. Schafer, alleging that he and the class were entitled to retroactive benefits as a remedy for the unconstitutional Longevity Bonus Program. See Vest v. Schafer, 757 P.2d 588, 589 (Alaska 1988). The motion claimed that the state was liable for damages under 42 U.S.C. § 1983 or, in the alternative, under a cause of action directly implied from the state constitution or the Fourteenth Amendment under the rationale of Bivens v. Six Unknown

Named Agents, 403 U.S. 388 (1971). Vest, 757 P.2d at 589. Petitioner also sought damages from Ms. Schafer under the same theories. Id.

The superior court denied petitioner's motion, instead granting summary judgment in favor of the respondents. Id. The court found that the state was not subject to suit under 42 U.S.C. § 1983, in accordance with the decision of State v. Green, 633 P.2d 1381 (Alaska 1981), which held that the state was not a "person" under that law. Moreover, the superior court found the state immune from actions brought directly under the state or federal constitution, without deciding whether a Bivens cause of action could lie in this case. Under the rationale of Kentucky v. Graham, 473 U.S. 159, 165-66 (1985), claims against Ms. Schafer in her official capacity were

essentially against the state and were disposed of on the same basis. 3/ Personal capacity claims against Ms. Schafer were rejected on the grounds that she was entitled to qualified good faith immunity as a matter of law. App. C1-C4.

The superior court recognized two additional obstacles to the relief sought by petitioner under a Bivens-type cause of action.

> First, Bivens was predicated on a factual situation where injunctive or declaratory relief would be useless because the person had already been injured when the unconstitutional act occurred and suit was brought.... After reviewing the uselessness of other types of relief, Justice Harlan, in concurrence, wrote the now-familiar words: "For people in Bivens' shoes, it is damages or nothing." [Citation omitted.]

3/ The petition herein does not challenge this treatment of the official capacity claims below.

> That is not the case here. When the unconstitutional act -- passage of the legislation -- occurred, plaintiff Vest or other members of the plaintiff class were free to seek declaratory and injunctive relief, which would have given them the full judicial relief to which they would have been entitled. They could have stopped the program at the outset, thus avoiding any "injury". It is only because the plaintiff(s) did not bring this action sooner that they can now even claim that there has been a compensable "injury". The law should not countenance such an anomalous result.

App. C5-C6.

Moreover, the superior court noted that a damages remedy based on "back payments" is inappropriate because it would be "tantamount to judicial enactment of a longevity bonus program which included the plaintiffs as beneficiaries from the start." App. C7. Had a court ruled the program unconstitutional at its inception, the legislature had no duty to

create any particular program which included petitioner among its beneficiaries. Recognizing that the legislature could have contemplated any number of approaches, including having no program at all, the court concluded it was not in a position to determine what the legislature would or should have done. App. C7-C9.

The Alaska Supreme Court affirmed the lower court's ruling with respect to the state's liability for damages under 42 U.S.C. § 1983. Vest, 757 P.2d at 594. Deciding that, in the circumstances of this case, a Bivens cause of action against the state would not be recognized by a federal court under the Fourteenth Amendment, the court found no theory available for obtaining damages from the state for an unconstitutional law. Id. The supreme court did not reach the

question of whether immunity barred petitioner's claims against Ms. Schafer personally, finding instead that the program administrator was not a proper defendant in an individual capacity. Id. at 599-601. "The essence of Vest's lawsuit is a challenge of state statutes, not a challenge of Schafer's behavior." Id. at 601. The court therefore concluded that imposition of personal liability, merely for executing legislative mandates, without any "wrongful individual action," was inappropriate.

REASONS FOR DENYING THE WRIT

Several compelling reasons justify denial of the petition for certiorari. Most significant is the simple fact that no court has ever recognized a damages remedy, as petitioner requests, for the

enactment and execution of legislation later found to be unconstitutional.

Petitioner asserts that "the dispositive issue in this case is whether the State enacted and enforced legislation in good faith." Petition, p. 9. That is not correct. The issue is one of remedy. The Alaska Supreme Court's decision in Vest v. Schafer is in keeping with the great weight of authority that the remedy for an invalid law is to strike the law, not to award damages. 4/

4/ The Alaska Supreme Court did not need to address the state's good faith in enacting or enforcing legislation to dispose of this case. The superior court found good faith on the part of the administrator who executed the program, because the law's unconstitutionality was not clearly established until the court ruled in the instant case. See n.2, supra; App. C1-C4.

The reasons proffered in support of the petition do not meet the standard expressed in Supreme Court Rule 17.1. The Vest decision does not conflict with decisions of other state courts of last resort, federal courts of appeal, or this Court with respect to a federal question. Moreover, Vest does not present an important question of heretofore undecided federal law which should be settled by this Court.

I. The Fact That This Court Has Already Decided To Review Whether A State Is A "Person" Subject To Suit Under 42 U.S.C. § 1983 Militates Against Review Of That Portion Of The Alaska Supreme Court's Decision In Vest v. Schafer.

As petitioner has acknowledged, this Court has decided to review the question of whether a state is a "person" subject to suit under 42 U.S.C. § 1983 this term. Smith v. Department of Public Health, 410

N.W.2d 749 (Mich. 1987), cert. granted sub nom. Will v. Michigan Department of State Police, __ U.S. __, 108 S.Ct. 1466, 99 L.Ed.2d 696 (Apr. 19, 1988). The Will case is in precisely the same posture on the issue of state liability under § 1983 as the instant case: the Michigan Supreme Court found, as has the Alaska Supreme Court, that the state is not a person for purposes of that law. Smith, 410 N.W.2d at 766. The respondents understand that all briefs have been filed in that action, including no fewer than three briefs of amici curiae. Oral argument is scheduled for December 5, three weeks from now.

Because the Court's decision in Will will fully settle the question of whether a state is a "person" under § 1983, that portion of the Vest decision will not present "an important question of federal

law which has not been, but should be, settled by this Court." Supreme Court Rule 17.1(c). That being the case, there is no special or important purpose to be served by this Court reviewing the § 1983 aspect of Vest.

II. Whether A State Court Must Recognize A Bivens Cause Of Action For Damages Against A State, Based On The State's Enactment Of A Law Later Found To Be Invalid Under The Fourteenth Amendment, Does Not Present A Conflict This Court Needs To Resolve.

Although invited by petitioner to do so, the Alaska Supreme Court declined to recognize a cause of action for damages against the state stemming directly from the Fourteenth Amendment to the United States Constitution under the rationale of Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Vest, 757 P.2d at

594-98. More specifically, the court held that

> a Bivens-type action, brought in state court against the State, cannot be allowed to stand when it is grounded on a claim that the legislature enacted a law later found to violate the equal protection clause of the fourteenth amendment of the Constitution.

Id. at 598. The Vest court expressly did not decide that there was no situation in which unconstitutional behavior could give rise to a federal Bivens-type action against the state in state court. Id. at 598 n.36.

While this Court has stated that the question of availability of a Bivens claim under the Fourteenth Amendment is "extremely important," that fact alone is not determinative of whether the petition for certiorari should be granted in this case. See Mt. Healthy City School District Board of Education v. Doyle, 429

U.S. 274, 278 (1977). Several additional variables involved in Vest moot the question of whether a Fourteenth Amendment violation can be remedied by a Bivens-type damages claim.

In Bivens, 403 U.S. at 389-97, this Court recognized a cause of action for damages under the Fourth Amendment against federal employees acting under color of their authority. The Bivens rationale has been applied to create remedies against federal agents in the context of the Fifth Amendment, Davis v. Passman, 442 U.S. 228 (1979), and the Eighth Amendment, Carlson v. Green, 446 U.S. 14 (1980). However, this Court's "more recent decisions have responded cautiously to suggestions that Bivens remedies be extended into new contexts." Schweicker v. Chilicky, ___ U.S. ___, 108 S.Ct. 2460, 2467 (1988); Bush v. Lucas,

467 U.S. 267 (1983); Chappell v. Wallace, 462 U.S. 296 (1983). Moreover, a Bivens cause of action may be defeated where there are "special factors counselling hesitation in the absence of affirmative action by Congress." Bivens, 403 U.S. at 396; see also Carlson, 446 U.S. at 18.

Even assuming arguendo that the Fourteenth Amendment supported a Bivens cause of action, separation of powers concerns and notions of federalism preclude such a judicially created remedy against a state under the circumstances of this case. As the Alaska Supreme Court noted, the traditional remedy for an unconstitutional statute is declaratory or injunctive relief. Vest, 757 P.2d at 594. "Neither the United States nor any state has ever been liable for damages because its legislative body has enacted legislation that is later held

unconstitutional." K. Davis, Administrative Law Treatise, § 25.00-4 (1982 Supp.). See also HFH, Ltd. v. Superior Court of Los Angeles County, 542 P.2d 237, 245 (Cal. 1975), cert. denied 425 U.S. 904 (1976). If a court held a state responsible for unconstitutional legislation in terms of money damages, the process of legislating would be profoundly inhibited.

A judicially created remedy against states is inappropriate additionally because of the states' "independent status in our constitutional scheme." Vest, 757 P.2d at 596. "Congress, where the states are represented, is in a better position than the federal judiciary to weigh the competing policies implicated in creating an entirely novel damages remedy against states." Id. Insofar as the decision whether to imply a damage remedy for

constitutional violations is a matter of federal policy, and the nation has a strong interest in the vitality of a state's legislative process, the court found it would be poor federal policy to require state judiciaries to impose damages for unconstitutional state laws "in the absence of congressional mandate." Id. at 597-98.

Injunctive relief is adequate to protect petitioner's rights and "vindicate the federal interest in assuring the Supremacy of [its] law." Green v. Mansour, 474 U.S. 64, 106 S.Ct. 423, 426 (1985). The chilling effect of extending damages liability to the very act of legislating, which has historically been immune from suit, is clearly a special factor counselling hesitation in the creation of a Bivens remedy in this case.

In analyzing the availability of a judicially created damages remedy for an unconstitutional law, the Alaska Supreme Court did not deviate from the analysis set forth by this Court in Bivens and its progeny. Furthermore, the Vest decision on this point does not conflict with authority from federal appellate courts or other state courts of last resort. Supreme Court Rule 17.1.

Finally, it should be noted that this Court has not recognized a Bivens remedy against anyone but federal agents acting under color of their authority. See Vest, 757 P.2d at 595 n.23. Because federal agents are not subject to suit under 42 U.S.C. § 1983, federal Bivens actions can be viewed as a complement to

§ 1983 actions against state officials. 5/ The absence of authority from any court holding a nonfederal, governmental entity liable under a federal Bivens claim militates against granting the petition for certiorari.

Because Vest is in keeping with the decisions of this Court and of other jurisdictions, and because it does not present an appropriate case to answer the Bivens question left unresolved in Mt. Healthy, 429 U.S. at 278, this Court should deny the petition on the Bivens issue.

5/ See, e.g., Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984); Butz v. Economou, 438 U.S. 478, 504 (1971) (same qualified immunity applies in suits against state officers under § 1983 and in suits against federal officers under Bivens).

III. The Alaska Supreme Court's Holding That Ms. Schafer, Who Merely Executed A Program According To State Law And Did Nothing Wrongful, Was Not A Proper Defendant In A Personal Capacity For Damages Does Not Conflict With Decisions Of This Court.

As stated above, the Alaska Supreme Court found that the administrator of the Longevity Bonus Program was not subject to suit in her personal capacity under the theories advanced by petitioner. Vest, 757 P.2d at 599-601. Ms. Schafer was not a proper defendant in her personal capacity because she merely executed the program according to state law, and did not engage in any wrongful individual conduct. Id.

Because petitioner's complaints failed to specify whether Ms. Schafer was being sued personally, officially, or

both, id. at 599, 6/ the court was called upon to determine "the nature of the liability sought to be imposed." See Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985); Brandon v. Holt, 469 U.S. 464, 469 (1985). One consideration is whether the state is the "real party in interest." Kentucky, 473 U.S. at 166. Because petitioner alleged an interest in seeking relief from any liability insurance, official bond, or indemnification agreement applicable to Ms. Schafer (the actual existence of which was not evident in the record), the "real party in interest" analysis was inconclusive. Vest, 757 P.2d at 600.

6/ Official capacity claims were treated the same as claims against the state. Vest, 757 P.2d at 598-99. That is not at issue here. See n.3, supra.

However, there is another consideration involved in determining whether a claim is against a state agent personally or against the state itself." Relying on language from this Court's unanimous decision in Ford Motor Co. v. Dept. of Treasury of the State of Indiana, 323 U.S. 459, 462 (1945), the Alaska Supreme Court identified "whether there is wrongful individual action" as a decisive criterion. Vest, 757 P.2d at 600. While the court acknowledged that Ford Motor Co. involved the Eleventh Amendment, which was clearly not at issue in Vest, the court saw no reason for the test of whether a suit is against a state or an individual to differ in the contexts of the Eleventh Amendment, § 1983, and Bivens. Id.

In this case the program administrator merely complied with legislative

mandates, issuing bonuses only to those who were eligible under the statutes. Id. Such conduct was not wrongful. A state official is under no duty to question the law's validity or refuse to discharge the ministerial duties with which she is charged by law. "To require disobedience on the part of government employees whenever their personal assessment of an enactment differs from that of the legislature would accomplish little other than creating chaos in government." Id. at 601.

Because the complaint and the record essentially challenged state statutes, not Ms. Schafer's behavior, claims against the administrator in her personal capacity were inappropriate. It is therefore unnecessary to determine whether, as the superior court had concluded (See App. C1-C4), qualified good

faith immunity bars petitioner's claims against Ms. Schafer individually.

The Vest holding on the matter of personal liability is not at odds with previous decisions of this Court. The cases cited by petitioner all pertain to whether individual liability, or immunity, will flow from wrongful activity. Petitioner does not acknowledge the distinction between whether an individual is a proper defendant in a personal capacity, under the rationale of Kentucky v. Graham and Ford Motor Co., supra, and whether the individual is entitled to immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982). The Alaska Supreme Court has recognized the distinction, in full adherence to this court's holdings.

Not surprisingly, petitioner cites no cases to support his contention that a damage claim can be predicated simply on

an official's non-negligent enforcement of a law later held by a court to be unconstitutional. While petitioner contends that Ms. Schafer should be subject to suit because there was "no colorable basis" for her execution of the law, the simple fact remains that petitioner's complaint is with the law, not the individual. See Rosado v. Wyman, 414 F.2d 170, 178 (2d Cir. 1969), rev'd on other grounds, 397 U.S. 397 (1970) (attack on state statute, not on action taken under it, made suit one properly against the state, not against state official as an individual).

The Alaska Supreme Court's decision in Vest is in harmony with the law enunciated by this Court. Had petitioner challenged arbitrary enforcement of the law, for example, then he could properly sue the responsible official in a

personal capacity under § 1983. At that point, the test for determining good faith immunity under Harlow would apply. However, the instant case presents no such facts. Because the Vest decision does not raise an important conflict for this Court to resolve, the petition for certiorari regarding Ms. Schafer's personal liability should be denied.

CONCLUSION

Petitioner failed to articulate a theory to the Alaska Supreme Court under which he would be entitled to damages. He has similarly failed to articulate sufficiently substantial issues to

warrant this Court's consideration. 7/ Supreme Court Rule 17.1.

The appropriate remedy for an invalid law -- declaratory and injunctive relief -- has already been provided. Petitioner is entitled to nothing more from any court. To rule otherwise would drastically impede states' experimentation with social and economic change.

7/ To the extent that petitioner has made no argument whatsoever regarding paragraphs 5 and 7 of the "Questions Presented" in his petition (p. i), he has not shown any special and important reasons for granting the petition on those points. Supreme Court Rule 17.1. Additionally, it is not evident from the petition or appendix that these issues were properly raised in the courts below. See Supreme Court Rule 21(h). Consequently, this Court should reject the petition on these points.

For the reasons expressed herein, respondents request that the petition for certiorari be denied.

RESPECTFULLY SUBMITTED this 10th day of November, 1988.

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APPENDIX C

Excerpt from Memorandum of Decision, issued by Superior Court Judge Walter L. Carpeneti February 20, 1987

2. §1983 claim against Marian Schafer in her individual capacity.

A government official sued in her individual capacity under §1983 is entitled to a qualified good faith immunity for official acts. Wood v. Strickland, 43 L. Ed. 2d 214, 225 (1975); Scheuer v. Rhodes, 40 L. Ed. 2d 90 (1974) (official not immune if he knew or should have known that the action he took violated settled or unquestioned constitutional rights). Harlow v. Fitzgerald, 73 L. Ed. 2d 396 (1982) deleted the subjective element of this test, casting it in objective term to meet the admonition in Butz v. Economou, 57 L. Ed. 2d 895, 916 (1978) that insubstantial claims should not

proceed to trial:...[quotation omitted]. Harlow v. Fitzgerald, 73 L. Ed. 2d at 410.

Defendants have argued persuasively that the law was not "clearly established" until the decision of the Supreme Court of Alaska affirmed the trial court in striking down the program. Although some doubts were raised about the program, no person ever brought a legal challenge in the first 10 years of its existence. Moreover, even a legal scholar as sympathetic to the plaintiff's point of view concerning durational residency requirements as Justice Dimond (who wrote the opinion for the court striking down the tax relief statute in Williams v. Zobel, 619 P.2d 422 (Alaska 1980) and whose dissent in the permanent fund dividend case, Williams v. Zobel, 619 P.2d 448 (Alaska 1980) was later vindicated by

the United States Supreme Court) suggested in his dissent in the permanent fund dividend case that the longevity bonus program was distinguishable from the permanent fund dividend program and thus constitutionally valid, id. at 469 n. 13.... In any event, it is simply not accurate to conclude that the unconstitutionality of the longevity bonus program was "clearly established" before the courts ruled. Under these circumstances, there is no disputed issue of material fact and thus summary judgment in Marian Schafer's favor is appropriate.

. . . .

4. Bivens-type claim against Marian Schafer in her individual capacity.

A public official sued in her individual capacity is entitled to a qualified good faith immunity against Bivens actions as well as §1983 actions. As the

court stated in Davis v. Scherer, 82 L. Ed. 2d 139 (1984), "the same qualified immunity rules apply in suits against state officers under §1983 and in suits against federal officers under Bivens." Id. at 149-50 n.12. See also Butz v. Economou, supra, 57 L. Ed. 2d at 914. Therefore, the analysis used in Part 2, above, is equally applicable here. Because the law was not "clearly established" before the courts ruled, Ms. Schafer enjoys immunity for her good faith administration of the law in question.

In addition to the bars posed by the doctrine of sovereign immunity (guaranteed by the federal constitution, partially waived by the Alaska Constitution and embodied now in a limited form in AS 09.50.250) discussed in Part 3, above, and the doctrine of qualified good faith

immunity discussed in Part 4, above, there are at least two further obstacles to the relief sought by the plaintiff under a Bivens-type cause of action.

First, Bivens was predicated on a factual situation where injunctive or declaratory relief would be useless because the person had already been injured when the unconstitutional act occurred and suit was brought. 9/ Bivens' abode had already been invaded; he had already been arrested and manacled in front of his family, whose arrest was also threatened; and his apartment had already been searched "from stem to stern". He had already been interrogated, booked and

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9/ As the Court summarized in Butz v. Economou, supra, 57 L. Ed. 2d at 915: "Injunctive or declaratory relief is useless to a person who has already been injured."

strip searched. Bivens, supra, 29 L. Ed. 2d at 622. After reviewing the uselessness of other types of relief, Justice Harlan, in concurrence, wrote the now-familiar words: "For people in Bivens' shoes, it is damages or nothing." Id. at 635. That is not the case here. When the unconstitutional act -- passage of the legislation -- occurred, plaintiff Vest or other members of the plaintiff class were free to seek declaratory and injunctive relief, which would have given them the full judicial relief to which they would have been entitled. They could have stopped the program at the outset, thus avoiding any "injury". It is only because the plaintiff(s) did not bring this action sooner that they can now even claim that there has been a compensable "injury". The law should not countenance such an anomalous result.

Second, a damages remedy based on "back payments" is inappropriate in this case because a court does not have the power to legislate, and an award of "back payments" would be tantamount to judicial enactment of a longevity bonus program which included the plaintiffs as beneficiaries from the start. Neither this nor any other court has that power. While the legislature was free to enact such a program if it chose to, and while the legislature was not free to structure a program which included an unconstitutional residency requirement, 10/ that is not the same as saying that the legislature had a duty to create any particular program, and that the failure to create

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10/ Schafer v. Vest, 680 P.2d 1169 (Alaska 1984).

one which included plaintiffs as beneficiaries constituted a breach of that duty for which the state is answerable in damages. It seems unexceptionable to say that the legislature, if confronted with a court ruling in 1972 that the plan it adopted was unconstitutional, might well have decided that the state could not afford a program which would be constitutionally acceptable. Or it might have decided that it could afford a program which passed constitutional muster but only at a lower level of benefits for each recipient. Or it might have decided to structure an entirely different program. Or it might have abandoned the idea. That it <u>might</u> have taken any of these approaches (or none of them) suggests to this court that it would be wholly inappropriate for a judicial remedy to be fashioned now which in effect

says the legislature would have adopted a particular one had the constitutional law been clearly established at that time, or that it should have done so.

CONCLUSION

For the reasons expressed above, the court denies the plaintiff's motion for summary judgment for an award of back benefits and grants the state's cross motion for summary judgment.

DATED this 20th day of February, 1987.

Walter L. Carpeneti
Superior Court Judge